IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8646 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MESSRS VIMAL ENTERPRISE & 2 - Petitioner(s)
Versus
THE UNION OF INDIA THRO' THE SECRETARY, & 3 - Respondent(s)

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Appearance :

MR PARESH M DAVE for Petitioner No(s).: 1,2.
MR JITENDRA MALKAN for Respondent No(s).: 1.
NOTICE SERVED BY DS for Respondent No(s).: 2,3.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 04/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The learned Advocate for the petitioner seeks permission to amend the prayer clause of the petition. Permission granted. Amendment to be carried out immediately.

2 This petition under Article 226 of the Constitution of India seeks a writ of certiorari or any other appropriate writ, direction or order quashing and setting aside the order No. C II/1410/WZB/2003 dated 11,6,2003/17.6.2003 (Annexure-J), Order No.M-5/C-IV/WZB/2004 dated 12.3.2004 (Annexure-L), OIA No. COMMR(A)/386/VDR/98 dated 25.3.1998 (Annexure-H) and OIO No.D/84/ANK/ADC/P&V/96-97 dated 27.2.1997 (Annexure-F) whereby Customs, Excise & Service Tax Appellate Tribunal, (CESTAT) West Zonal Bench, Mumbai has upheld the order of Commissioner of Appeals denying the modvat credit of Rs. 3,57,997/- to the petitioner.

3 Rule. Mr.Jitendra Malkan waives service of Rule on behalf of the respondents. By consent of the learned Counsel appearing for respective parties the matter is taken up for hearing and final disposal today.

4 The petitioner, a partnership firm, engaged in business of manufacture of texturized synthetic filament yarn at its factory purchased certain inputs for the manufacturing process and availed credit of duties paid on such inputs. As per duty paid documents of inputs for the period from July 1994 to August 1994 the petitioner had taken total modvat credit amounting to Rs.4,22,230/-. It appears that on scrutiny and verification of duty paying documents as the Adjudicating Authority was of the opinion that the availment of such modvat credit was not permissible a show cause notice came to be issued on 4.1.1995 upon the petitioner to show cause why the same should not be recovered and consequently penalty be not imposed. After considering the assessee's explanation the Adjudicating Authority passed an order on 27.2.1997

directing the recovery of Rs.4,22,230/- under Rule 57I of the Central Excise Rules,1944(the Rules). A personal penalty of Rs.45,000/- also came to be imposed under Rule 173Q(1) of the Rules. The assessee carried the matter in appeal before Commissioner (Appeals) who for the reasons stated in his order dated 25.3.1998 held that the petitioner had purchased inputs from two different parties and in so far as modvatable credit of Rs.64,233/- based on invoice issued by M/s.Garware Nylon Ltd. was concerned the same was a modvatable invoice and the petitioner was entitled to the modvat credit.

4.1 However, in relation to 14 invoices of one M/s.J.C.T. Limited it was observed that the invoices contained the details as required under Notification No.15/94 but M/s. J.C.T. Limited had been registered on 6.1.1995 and not upto 31.12.1994. Therefore, the invoices issued by M/s.J.C.T. Ltd. were not valid duty paying documents. Accordingly, the petitioner was denied modvat credit to the tune of Rs.3,57,997/-.

5. The petitioner went before CESTAT who vide its

order dated 17.6.2003 dismissed the appeal on the basis of circular dated 8.11.1994 issued by Central Board of Excise & Customs (the Board). On behalf of the petitioner an order of Single Member Bench in the case of *Bengal Safety Industries Vs. Collector of Central Excise, Calcutta 1997(92) ELT 81* was cited. The Tribunal however, on the basis of the Board's circular dismissed the appeal.

6 The petitioner preferred an application seeking rectification of mistake. While rejecting the application it was observed by CESTAT as under :

> *"I note that, the miscellaneous application seeks to reverse the findings given by the Tribunal in its final order dated 17/06/2003 on the basis of certain evidence, which was allegedly not considered by the Tribunal. From the records, it is seen that, the dealer having been registered only on 06/01/95, the Bench dismissed the appeals, for the reasons that the invoices did not conform to the conditions prescribed in*

Notification No.15/94-CE(NT) dated 30/03/94.In terms of the said Notification,obtaining the registration before 31/12/94 was a statutory requirement. In the circumstances, I find no error apparent on record and the miscellaneous application for rectification of defect has to be rejected".

It is in the aforesaid circumstances that the present petition has been filed.

7 It was submitted by Mr.Paresh Dave, learned Advocate for the petitioner that before March,1994 excisable goods were cleared by issuance of gate passes and when the said goods were resold by the purchaser the gate passes were endorsed. However, with effect from March,1994 the clearance of excisable goods from factory was prescribed by the Central Government to be under invoices. A buyer of such goods was allowed to issue another invoice containing details of the goods, details of the manufacturer of goods, payment of such duties etc. as per Notification

No.15/94-CE(NT) dated 30.3.1994.

7.1Thereafter, it was submitted that, vide Notification No.33/94-CE(NT) dated 4.7.1994 rules were amended and dealers/traders were required to be registered if they were dealing in purchase of resale of excisable goods. On 7.11.1994 another Notification was issued whereunder rule 57H of the rules came to be amended relating to the procedure prescribed for registration of dealers so as to cover transitional period.

8 The case of the petitioner is that the revenue authorities and the Tribunal have wrongly read the circular to mean that a dealer has to be registered by 31.12.1994 or else the invoice issued by such dealer, despite denoting duty paid status would not be accepted as valid document for permitting the purchaser of such goods to avail of modvat credit. It is submitted that once a dealer has applied for registration on or before 31.12.1994 any registration which is granted subsequently would become effective from the date of the application and therefore in the

present case, M/s.J.C.T. Limited having applied for registration on 29.12.1994, registration granted to the said dealer on 6.1.1995 would be operative from 29.12.1994, and in the circumstances, invoice issued during the period of July and August,1994 by the said dealer would be valid document on the basis of which the petitioner would be entitled to modvat credit. In support of the aforesaid proposition reliance was placed on the decision of Apex Court in the case of *Commissioner of Central Excise Vs. M.P.V. & Engg. Industries 2003(153) E.L.T.485(S.C.) .*

8.1. It was also submitted that even if the language required that such certificate shall take effect from the date of its issue yet in the case of *State of U.P. And Another Vs. Haji Ismail Noor Mohammad And Co., (1988) 3 SCC 398 , the* Apex Court held that even if the certificate was granted subsequently and the dealer possesses the same at the time of assessment that would be sufficient compliance of the requirement of the provision. Another decision on which reliance was placed was *The Assessing Authority and*

others Vs. M/s. Patiala Biscuit Manufacturers Pvt.Ltd., AIR 1977 (S.C.)1339.

9 He therefore urged that the petitioner having done all that was within its powers, and the supplying dealer namely M/s. J.C.T. Limited having applied for registration on 29.12.1994, the petitioner could not be penalised by denying modvat credit merely because registering authority had issued certificate on 6.1.1995.

10 Mr.Malkan appearing on behalf of the respondent authority submitted that the present case involved almost identical issue of law and of facts as in the case of *Chistia Texturising Vs. Union of India* decided by this Court on 1.11.2004 in Special Civil Application No. 10923 of 2004 and hence, the matter may be remanded to CESTAT for deciding the appeal afresh as was done by this Court in the aforesaid case.

10.1 Alternatively it was submitted that the amendment in the rules has been made to ensure that no

malpractice takes place and the revenue authorities are able to check the receipt and disposal of inputs both in the hands of the supplying dealer as well as the petitioner. Therefore, the view adopted by the Tribunal was correct and no interference was called for. He placed reliance on decision of Larger Bench of the Tribunal in case of *Balmer Lawrie & Co. Ltd. Vs. Commissioner of Central Excise, 2000(116) E.L.T. 364 (Tribunal)and* adopted the reasoning of the Tribunal in its order dated 10.1.2000.

11 Having gone through the aforesaid decision in case of Chistia Texturising it is not possible to accept the contention that the facts are identical. The only grievance made before the Court in the said matter was : that CESTAT had not considered binding decisions of CESTAT itself cited before it. The Court thereupon restored the appeal to the file of CESTAT. No such grievance exists in the present case, none is made at the hearing.

12 The undisputed facts are that the petitioner

obtained various goods (inputs) from M/s.J.C.T. Limited in July and August, 1994. As recorded by the Commissioner (Appeals) the said invoices contain the necessary details as required under Notification No.15/94. M/s.J.C.T. Limited had made an application before the Appropriate Authority seeking registration on 29.12.1994 and registration has been granted on 6.1.1995. Therefore, the invoices have been issued prior to 31.12.1994. Admittedly, when the invoices were issued M/s.J.C.T. Limited was unregistered dealer. The limited question therefore is, whether the aforesaid circular No. 76/76/94-CX dated 8.11.1994 could be invoked to deny the modvat credit to the petitioner.

13 The Central Board of Excise and Customs issued Circular No. 76/76/94-CX dated 8.11.1994 in connection with the earlier Notification No.64-CE(NT) dated 7.11.1994. As the said circular and the effect thereof is the bone of contention between the parties the same is reproduced in entirety hereunder :

" Circular :76/76/94-CX dated 08-Nov-1994

Modvat-Amendment to Rule 57H- Invoice is a valid document for taking credit.

Circular No.76/76/94-CX, dated 8-11-1994

[From F.No.267/50/94-CX.8]

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject :Forwarding of Notification No.64-C.E. (N.T.), dated 7th November,1994 – Regarding.

1 I am directed to forward herewith a copy of Notification No.64-C.E.(N.T.), dated 7th November,1994 amending rule 57H.

2 Rule 57H of the Central Excise Rules,1944 deals with transitional provisions. The present amendment to the said rule , *inter alia, permits* acceptance of 'any invoice' or 'any document' as may be prescribed by the Central Board of Excise and Customs as valid document under Rule 57G.

3 The present amendment to Rule 57H has been

made to remove the difficulties arising out of the budgetary changes in 1994-95 relating to acceptance of 'invoice' as proper document for the purpose of Modvat credit and issue of Notification such as Notification No.21/94-C.E. (N.T.), dated 12.5.1994 and Notification No.32/94-C.E. (N.T.), dated 4.7.1994. The Assistant Collector, at his discretion could accept the invoice issued by the person referred to in Rule 52A Notification No.15/94-C.E.(N.T.), and Notification No.21/94-C.E.(N.T.).

4 Now therefore by virtue of powers conferred by Rule 57H of the Central Excise Rules,1944, the Central Board of Excise and Customs hereby prescribes the invoice/document issued by -

(i) a manufacturer from his factory;

(ii) a manufacturer from his depot;

(iii) a wholesale distributor/dealer of the manufacturer; or

(iv) an importer from his godown;

as valid document for the purpose of allowing Modvat Credit.

5 It is clarified that such invoice should contain the details as referred to in Notification 15/94-C.E.(N.T.), and Notification 21/94-C.E. (N.T.). The Assistant Collector shall recognize such document if issued by the categories of persons mentioned in the said notifications, who have got themselves registered under Rule 57GG of the Central Excise Rules, consequent to issued notification No.32/94-C.E. (N.T.), dated 4.7.1994.

6. It is further clarified that the document prescribed above by the Central Board of Excise and Customs could be accepted by the Assistant Collector only upto 31st December,1994. In other words, any document issued by registered person prior to such registration would be acceptable if he is eligible to issue invoice/document under Notification No.15/94-C.E.(N.T.) and Notification No.21/94-C.E.(N.T.).

7 In view of above the Board desires that an immediate exercise should be taken as per provisions of law so that the credit intended

to be allowed, as above, is not denied.

8 Trade and field formations may be suitably informed."

13.1 Paragraph No.3 of the said Circular states that amendment to Rule 57H has been made to remove the difficulties arising out of the budgetary changes in 1994-95 relating to acceptance of invoice as proper document for the purpose of modvat credit. It is further stated that Assistant Collector is entitled to accept the invoice issued by the persons referred to in Notification Nos. 15/94 and 21/94, at his discretion.

13.2 Paragraph No.4 of the Circular lays down four categories of persons from whom, if any invoice or document emanates, it would be a valid document for the purpose of allowing modvat credit.

13.3 Paragraph No.5 states that such invoice should contain the details as referred to in Notification Nos. 15/94 & 21/94 and that the Assistant Collector shall recognize such document, if issued by

the categories of persons mentioned in the Notification, and who have got themselves registered under Rule 57GG of the Rules.

13.4 Paragraph No.6 of the Circular lays down that the prescribed document could be accepted by the Assistant Collector only upto 31.12.1994, i.e. in other words, any document issued by registered person prior to such registration would be acceptable if such person issuing the document is eligible to issue invoice/document as prescribed by Notification No.15/94 & Notification No.21/94. To put up it differently, the discretion vested in the authority vide paragraph No.3 of the Circular is available for exercise upto 31.12.1994. The Circular nowhere stipulates that the dealer has to obtain registration by 31.12.1994. In fact, the sentence which follows states that any document issued by a registered person prior to such registration would be acceptable if he is eligible to issue invoice/document under Notification No. 15/94 and Notification No.21/94. The language employed is plain, clear and unambiguous. A person who supplies

inputs is entitled to issue invoice or document prior to registration, the only requirement being that the invoice/document contains particulars mentioned in the two Notifications viz. Notification No.15/94 and Notification No.21/94; and further the person is one who is falling in the specified category of persons and he obtains registration. When the phrase “prior to such registration” is taken into consideration it indicates that the person issuing such invoice/document is entitled to obtain registration after issuance of the invoice/document. The cut-off date, if one may say so, viz. 31.12.1994 is only in relation to exercise of discretionary powers by the Assistant Collector. From that it does not flow nor does the language employed by the Circular indicate that a dealer has to obtain registration by 31.12.1994. The only inference that is available is that if a document/invoice is issued by a person after 31.12.1994 the Assistant Collector has no discretion vested in him to accept such document. It could be argued that if the authority does not have a discretion then the dealer has to be registered as a natural corollary by 31.12.1994. That could be a

plausible view but that by itself would not mean that the Circular prescribes that the registration has to be obtained by 31.12.1994. Otherwise the phrase "*prior to such registration*" becomes redundant and such an exercise cannot be ascribed to the Board.

14 Even if one proceeds on the assumption that such a view was the correct view, as laid down by the Apex Court in case of *State of U.P. And Another Vs. Haji Ismail Noor Mohammad And Co.,(supra)* the efficacy of the certificate of registration becomes material and relevant at the time when the assessee concerned is required to be granted modvat credit viz. at the time of assessment. In the case before the Apex Court while making assessment order under Sales Tax Act, it was held that a dealer would be entitled to concessional rate if he holds a recognition certificate when the assessment order is being drawn up. That it was not obligatory on the part of the purchasing dealer to produce the recognition certificate at the time of purchase. Even subsequent to the transaction of purchase, if the purchasing dealer furnishes to the

selling dealer a recognition certificate, the requirement of the provision would be fully satisfied. Dealing with the language employed by the statute therein viz. " *dealer holds recognition certificate*" and the contention based thereon, to the effect that term "*holds*" would signify that the recognition certificate must be available at the time of purchase, the Apex Court held that statutory language does not insist upon a contemporaneity of the holding of the certificate with the purchases and that it is sufficient if the dealer, subsequently, comes to hold a certificate in respect thereof.

15 Applying the aforesaid ratio to the facts of the case it is clear that the supplying dealer M/s.J.C.T. Limited, had applied for registration on 29.12.1994, and had been duly registered on 6.1.1995. In the circumstances, the petitioner could not be denied the benefit of modvat credit only on the technical plea that registration had been issued subsequent to the so called cut-off date viz. 31.12.1994. This is all the more so, when the finding

recorded by the Commissioner (Appeals), is taken into consideration. To reiterate : the Commissioner (Appeals)has categorically found that the invoices contained the details as required under Notification No. 15/94. The only ground on which the petitioner was non suited was that M/s.J.C.T. Limited was granted registration on 6.1.1995.

16 It would be travesty of justice if the assessee is denied benefit, to which it is otherwise entitled to, for no fault of the assessee. The assessee cannot, firstly, call upon supplying dealer to apply for registration before the cut-off date; secondly, even if the assessee does so and the supplying dealer makes application for registration before the cut-off date, it would be beyond the assessee or the dealer to ensure that the registration is granted by the cut-off date. There could be various circumstances, on the basis of which the registering authority, may not issue the certificate by so called due date. A simple example would be, absence of the registering authority, being on leave

and charge being available with some other officer, who because of more pressing work may not attend to the work for which he holds additional charge, and in such circumstances to expect that the dealer must obtain registration by due date would be asking almost for the impossible, especially from the assessee who is merely a purchaser. Therefore, the denial of modvat benefit only on this technical plea is not justified in law, especially when all other requirements have been fulfilled by the supplying dealer.

17 In this connection, the approach laid down by the Apex Court in the case of *Assessing Authority and Othrs Vs. M/s. Patiala Biscuit Manufacturers Pvt.Ltd.* (supra) requires to be adopted and applied to the facts of the case. It is stated thus :

> “16. Be that as it may, the words 'has been registered and possesses a registration certificate' used in sub-section (1) of Section 7 have to be construed in accord with the general tenor of the section as a whole, and in a manner which would avoid oppressive , unreasonable

> and anomalous results. As rightly pointed out in Chandra Industries v. The Punjab State, (1972) 29 STC 558 (Punj.) it could never be the intention of the Legislature that a dealer liable to pay tax who has in compliance with the requirements of sub-sections (2) and (3) of Section 7, 'done all which lay in his power to obtain the registration certificate, should pull down his shutters and keep his business closed under pain of being punished under Sec. 23 (1) and await indefinitely the pleasure and leisure of the prescribed authority in issuing the registration certificate. Adoption of such a construction would be to make the applicant liable to punishment for the laches and delays of the authority and its office".

18 Last but not the least. As stated in the Affidavit-in-Reply, underlying purpose of the provision, viz., amended Rules and the subsequent Notification and the Circular, is to ensure that the authority is in a position to cross check and verify

as to whether inputs have actually borne duty or not. If on facts, it is possible to find out that the transaction is genuine and bonafide transaction, the identity of the supplier is established, the document showing duty paid inputs is supported by the facts, and the records of the supplier show that the supplier has purchased duty paid goods before resale and passed on the credit of duty, there is no reason why the benefit should be denied. Once the object for which a provision is enacted is satisfied merely venial or technical breach by itself should not permit the authorities to adopt a stand which frustrates the object for which the entire scheme of modvat has been framed. The endeavour must be to ensure that the scheme is made effective and not frustrated. In other words, the goods , which have been subjected to duty when used as inputs for manufacture of final product, should not be made to bear duty once again as that would have a cascading effect not intended by legislature in so far as the ultimate consumer is concerned. Therefore, even approaching from the view point of ensuring that the object with which the

provision has been enacted is satisfied, if the facts of the present case are tested , the answer would be that the petitioner was entitled to avail of the modvat credit, the petitioner having done all that was possible within its powers and nothing further remained to be done so far as the petitioner was concerned.

19 The Larger Bench decision of the Tribunal in case of *Balmer Lawrie & Co. Ltd. Vs. Commissioner of Central Excise* (supra) on which reliance was placed by revenue merely lays down that registration has been made mandatory “only with a view to eliminate bogus, fictitious, fraudulent, benami traders/dealers from the commercial market and to bring more transparency in the trade and to avoid misuse”. Even while accepting the aforestated objective, as already stated hereinbefore, if the identity of supplier and the genuineness of the transaction is established there is no reason why the assessee should be denied what is legitimately due to it . The inference drawn by the Tribunal that the invoice issued by a dealer

who had failed to get himself registered upto 31.12.1994 cannot be legally treated as a valid document is not supported by a plain reading of the Circular accompanied by various Notifications. In fact the Larger Bench of the Tribunal has failed to assign any reason for drawing any such inference except for stating the object with which the amendment has been brought about. The said decision therefore cannot assist the case of the revenue.

20 In the result, in light of what is stated hereinbefore, it is apparent in the facts and circumstances of the case that the petitioner was entitled to modvat credit considering the fact that firstly, the supplier had issued invoices in July and August,1994, namely when the Adjudicating Authority had discretion available to it; secondly, the supplier had applied for registration on 29.12.1994 and had been registered on 6.1.1995; and thirdly, the supplier had issued invoices which admittedly complied with the requirements prescribed by various Notifications.

21. Hence, the order No. C II/1410/WZB/2003 dated 11,6,2003/17.6.2003 (Annexure-J), Order No.M-5/C-IV/WZB/2004 dated 12.3.2004 (Annexure-L), OIA No. COMMR(A)/386/VDR/98 dated 25.3.1998 (Annexure-H) and OIO No.D/84/ANK/ADC/P&V/96-97 dated 27.2.1997 (Annexure-F) are hereby quashed and set aside. The respondent authorities are directed to allow modvat credit of Rs.3,57,997/- to the petitioner. The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani,J)

m.m.bhatt